Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-939

FRANK PALMIERI,

Petitioner,

against

EUGENE LEFEVRE, Superintendent, Clinton Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

Questions Presented

1. Whether review should be denied of petitioner's Sixth Amendment claim for failure to exhaust State remedies?

2. Whether review should be denied of petitioner's due process and equal protection claims under the

Fifth Amendment for failure to exhaust State remedies and because the petition involves a State criminal proceeding?

3. Whether review should be denied because petitioner waived any right he might have to the transcript of his co-defendant's trial?

4. Whether review should be denied because under this Court's prior decisions, petitioner has not made out a substantial claim for a free transcript of his co-defendant's trial?

5. Whether review should be denied because the claims raised have uniformly been rejected by the State and Federal courts and this case was, in any event, correctly decided on the facts?

Statement of Facts

Respondent accepts the statement of facts of petitioner with the following reservations:

1. Immediately after the court granted petitioner Palmieri's motion to have his trial severed from that of his co-defendant, Michael Blake (1a: Vol. II, 594a-595a),* his counsel made an oral motion "for daily copy of the co-defendant's trial". (1a: Vol. II, 595a). Counsel argued that since he was retained under N.Y. County Law art. 18-b to

* For the convenience of the Court, respondent includes in Appendix "A" those pages of the transcript cited by petitioner in his application for certiorari and by respondent in this opposition. The page numbers before the colon refer to the pages of the Appendix. The volume and page numbers after the colon refer to the pages of the record on appeal of the criminal proceedings against petitioner Palmieri. The record on appeal against his co-defendant Blake included this same document with the same pagination.

represent an indigent and would feel it necessary to attend the co-defendant's trial and bill the County, it would save taxpayer funds and be more convenient for counsel if the Court ordered the minutes to be provided. (2a: Vol. II, 595a).

The Court denied the motion, saying:

> "I don't think the People against Montgomery [18 N Y 2d 993 (1966)] goes that far as to permit the minutes of a trial of another defendant, particularly where that defendant is represented by counsel of his own choice." (2a: Vol. II, 595a-596a).

On denial of that motion, counsel sought "a copy of the transcript", apparently referring to a transcript of the minutes to be prepared after the trial. The Court again held that *People* v. *Montgomery, supra,* "does not apply in this situation". It noted, however, that both requests could be made in New York Supreme Court, Special Term, Part I (hereinafter Special Term), on written papers. (2a: Vol. II, 596a).

2. Petitioner's written March 24, 1969, motion in Special Term was apparently* for either a transcript of the minutes of the trial of Michael Blake, his co-defendant, or for daily copy. The branch of the motion seeking daily copy was denied. Petitioner never clearly presented to the State courts, or indeed to the Federal courts herein, the question of his alleged entitlement to daily copy. On the instant petition he does not assert that claim. The branch of petitioner's pre-trial motion seeking a transcript after his co-defendant's trial was, "for the reasons stated on the

* Searches for the motion papers by petitioner's former counsel, the Federal Defenders Service Unit, by the executor of his trial counsel's estate and by that executor's counsel, by his appeal counsel, by the District Attorney, and by the Attorney General were unsuccessful. The heading of Special Term's order indicates the motion had two branches.

record . . . granted . . . only if the District Attorney orders copies for himself".

3. Co-defendant Blake was found guilty on March 28, 1969. Petitioner Palmieri was tried May 19-26, 1969. There was thus sufficient time between the conclusion of the co-defendant's trial and the commencement of petitioner's for the transcript to be prepared and a motion made for it in Special Term.*

4. Petitioner Palmieri moved on written papers in Special Term on August 7, 1969, after his trial, for co-defendant Blake's trial transcript. In the affirmation accompanying the motion, counsel sought the transcript to review "the alleged admissions, statements and confessions of Michael Blake during his trial which implicated [Petitioner] Palmieri . . . in order to fully protect [his] constitution [sic] rights . . ."** (7a).

5. Special Term denied the motion on September 9, 1969, holding that:

> "Clearly the relief sought herein can under no view of the facts be regarded as coming within the purview of *Montgomery, supra.* In *Montgomery,* the *defendant* [emphasis in original] was denied a copy of the minutes of a preliminary hearing which were necessary and pertinent to his defense while the same minutes by statute would have been available to him as a defendant if he was able to pay for them. Here, defendant Palmieri seeks not the minutes of his own trial, which were given to him at his request, but instead seeks the minutes of the trial of his co-defendant which, as noted above, was held separately at the special instance and request of the defendant.
>
> "The defendant's contentions are not supported by any statute nor any decision which would entitle him to minutes of a trial in which he was not a participant. Of a certainty this request may be placed before any appellate tribunal for its termination."

* The trial transcript of co-defendant Blake was submitted to the United States Court of Appeals for the Second Circuit as part of the supplemental record on appeal.

** For the convenience of the Court, the notice of motion and affirmation of petitioner's counsel, Michael Ruggiero, dated August 7, 1969, is included in respondent's Appendix "B" herein.

6. There is no indication in the record of a separate appeal from Special Term's denial of this motion, although the issue was raised in the appeal of conviction.

POINT I

Petitioner has not exhausted State remedies as to his Sixth Amendment claim of denial of effective assistance of counsel.

Petitioner first raised a claim that denial of his co-defendant's transcript deprived him of effective assistance of counsel under the Sixth Amendment on his appeal to the United States Court of Appeals for the Second Circuit of the denial of his application for a writ of habeas corpus. Respondent argued then and reasserts now that this was a new claim as to which petitioner had not exhausted State remedies and of which, under *Picard* v. *Connor,* 404 U.S. 270, 278 (1971), he could not now seek Federal review. See Brief for Respondent LeFevre before the United States Court of Appeals for the Second Circuit (hereinafter "Brief for Respondent"), at 16 n. "*". Petitioner never controverted respondent's argument.

POINT II

Petitioner cannot assert an independent claim under the Fifth Amendment to denial of due process and equal protection in a State criminal proceeding; in any event, he failed to exhaust State remedies as to any such claim.

Respondent noted below, without controversion by petitioner, that petitioner's Fifth Amendment claim was unclear and had not been presented to the State courts or to the Federal District Court. Brief for Respondent, at 16 n. "*". To the extent that this claim, which is still unclear in petitioner's present papers, is independent of his Fourteenth Amendment claim, it cannot be raised as an objection to State criminal court proceedings. See *Palko* v. *Connecticut*, 302 U.S. 319, 324-5 (1937); *Francis* v. *Resweber*, 329 U.S. 459, 467-9 (1947) (FRANKFURTER, J., concurring).

POINT III

Review should be denied because petitioner waived any right he might have to the transcript of his co-defendant's trial.

As noted above, petitioner's counsel at the pre-trial hearings said, at the same time he moved for the co-defendant's trial transcript, that if it was denied, he would have to attend that trial at the County's expense. (2a: Vol. II, 595a). It appears however, that he did not do so. (7a). If he had, his "trial notes might well [have provided] an adequate substitute for a transcript. . . ." *Britt* v. *North Carolina*, 404 U.S. 226, 229 n. 4 (1971). At the least, his notes might have allowed him to allege actual prejudice (assuming, *arguendo*, that there had been any) from denial of the transcript. His failure to attend represented a deliberate waiver of an adequate substitute for a transcript.

Petitioner's failure to show good cause for that waiver or actual prejudice from it bars Federal habeas corpus relief. *Cf. Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 n. 3 (1976); *Britt* v. *North Carolina*, *supra*, 404 U.S. at 230.

POINT IV

Review should be denied because under previous decisions of this Court, petitioner has not made out a substantial claim.

The right of an indigent criminal defendant to a transcript of his own trial is grounded on the fact that the transcript is *needed* on appeal, *Griffin* v. *Illinois*, 351 U.S. 12, 16 (1956) (BLACK, J.), but see *id.*, 351 U.S. at 30-32 (HARLAN, J., dissenting), and denial of it, or a reasonable alternative, would *preclude* the defendant from receiving a fair trial or adequate appellate review, *id.*, 351 U.S. at 17, 19 (BLACK, J.); *id.*, 351 U.S. at 23 (FRANKFURTER, J., concurring).

This Court has refused, however, to find that indigent defendants have a right to every legal weapon that other defendants may be able to purchase. *United States* v. *MacCollum*, 426 U.S. 317, 328 (1976) (no right to free transcript on Federal post-conviction motion to vacate sentence); *Ross* v. *Moffitt*, 412 U.S. 600, 608-10 (1974) (no right to free appointed counsel in second, discretionary State appeal). The State is only required to assure an indigent defendant the opportunity to present his claims fairly. *United States* v. *MacCollum*, *supra*, 426 U.S. at 328; *Ross* v. *Moffitt*, *supra*, 417 U.S. at 616.

Absent some showing of need, there is no reason to assume that a defendant will be unfairly handicapped in his defense by denial of a co-defendant's transcript.

Assuming, *arguendo,* that such a need were shown, so long as an adequate alternative to that transcript is available, a defendant would have no constitutional right to it. See *Griffin* v. *Illinois, supra,* 351 U.S. at 20. In New York there are several such alternatives.*

Since petitioner's claim is clearly without merit under the prior decisions of this Court, review of the instant petition should be denied.

POINT V

Review should be denied since the claims the petition raises have uniformly been rejected by the State and Federal courts and since the case was correctly decided on the facts.

In addition to the New York State courts in petitioner's original criminal proceeding and the United States District Court in the instant habeas corpus application, the United States Court of Appeals for the Sixth Circuit and the Tennessee Supreme Court have held that there is no constitutional right to a free transcript of a co-defendant's trial. *Elliot* v. *Morford,* 557 F. 2d 1228, 1232 (6th Cir. 1977); *State* v. *Elliot,* 524 S.W. 2d 473, 476 (1975).

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* First, a defendant's counsel may attend the co-defendant's trial and take notes as "an adequate substitute for a transcript," *Britt* v. *North Carolina, supra,* 404 U.S. at 229 n. 4, as petitioner's trial counsel proposed to do. Second, he may obtain an order, as did petitioner's counsel herein, for a free copy of the transcript if one is prepared for the prosecution. Third, if the prosecutor is aware of discrepancies in the testimony of a witness between trials, it would be his duty to alert the trial court. Fourth, the defendant's counsel could ask the co-defendant's counsel if there had been any surprises at trial, such as testimony varying from that in pre-trial proceedings. If there were, he could use that as grounds for a motion for the transcript. If there were not, then he could rely on the transcript of his own pre-trial proceedings and use that to impeach inconsistent testimony.

Likewise, the United States Court of Appeals for the Ninth Circuit has questioned whether such a right exists, finding that it would be at the "outer limits" of the rights of indigent defendants if it did. *United States* v. *Bamberger,* 482 F. 2d 166, 168 (9th Cir.), cert. den. 414 U.S. 1041 (1973). Reviewing the case before it, that Court found that even if the right existed, the defendant had shown no actual prejudice from its denial. *Id.,* 482 F. 2d at 168-9.

In its oral opinion affirming the District Court's decision herein, the United States Court of Appeals for the Second Circuit noted that while the transcript of a co-defendant's trial might be of some value to a defendant, one could not assume it would be as valuable as the transcript of the defendant's own trial. Since the right to the latter was not absolute, an extension of that right to the transcript of a co-defendant's trial would have to be based on a strong showing of need. *Draper* v. *Washington,* 372 U.S. 487 (1963). No such showing had been made by petitioner Palmieri.

Since the State and Federal courts are agreed that the right asserted by petitioner does not exist and that even if it were assumed to exist, it would only be triggered by a strong showing of need (or in Federal habeas corpus review of a State proceeding, by a showing of actual prejudice from its denial), there is no need for this Court to grant review. Moreover, under the standards set in those cases, the decision herein was clearly correct on the facts.*

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* As respondent noted below, petitioner had available to him the transcript of the pre-trial proceedings in his case prior to its severance, at his request, from his co-defendant. The fact that his counsel, who was concededly adequate, was not able to impeach adverse witnesses using petitioner's pre-trial transcript in no way suggests he would have done better using the co-defendant's trial transcript. Notably, the prosecution's witnesses were found credible by the trial judge and jury, and petitioner's were not. Petitioner's counsel herein has been unable to show how the co-defend-

(footnote continued on following page)

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
January 8, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent

GEORGE D. ZUCKERMAN
Assistant Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
of Counsel

(footnote continued from preceding page)

ant's transcript would have been of assistance. The transcripts of both petitioner's trial and his co-defendant's were submitted to the United States Court of Appeals for the Second Circuit in the appeal below by respondent with the assertion, uncontroverted by petitioner, that there were no true inconsistencies between the testimony of the witnesses common to both trials. The Second Circuit's finding that petitioner failed to show actual need for his co-defendants' transcript implicitly accepted respondent's argument. Moreover, the case against petitioner, both in terms of testimony and extrinsic evidence, the evidence of his consciousness of guilt through his post-conviction actions in coercion of one witness and suborning of perjury by another, is overwhelming, showing that even if there were error in denying petitioner the transcript, it was at most harmless constitutional error. See Brief for Respondent, at 14-18.

APPENDIX A

Extract from the Transcript of the Pre-Trial Proceedings against Michael Blake and Frank Palmieri, as printed in the Record on Appeal, *People* v. *Blake*, Vol. II, 594a-597a, and the Record on Appeal, *People* v. *Palmieri*, Vol. II, 594a-597a.

(594a) critically impaired. The use of said admissions against him does not offend due process. (Culombe v. Connecticut, 367 U.S. 568.)

I am convinced beyond a reasonable doubt, based upon the believable evidence, that the admissions of the defendant were voluntarily made and were not induced by fear or caused to be made by threats, violence, coercion or mistreatment of any kind, physical or mental, or by a combination of both, nor by deception, trickery or other improper influences, nor did the defendant suffer any violation of his constitutional rights.

Accordingly, I find that said admissions were voluntarily made by the defendant Blake, and his motion is in all respects denied, with an exception.

All right, I'll hear any other applications now.

Mr. Ruggiero: May I at this time in behalf of the Defendant Palmieri renew my motion previously made and held in abeyance pending the determination of this hearing for a separate trial.

Mr. Lombardino: People consent.

The Court: All right. Application of (595a) the Defendant Palmieri is granted and his trial is severed.

Mr. Ruggiero: Now, at this time, if your Honor please, in behalf of Defendant Palmieri, I—if your Honor desires that I make the application on affidavit I will do so—but I intend to ask the Court to furnish the Defendant daily copy of the codefendant's trial when it starts so that

we can be apprised of the record in order to properly prepare for the defense of Palmieri, for this reason: I was assigned under the Article 18-B of the County Law. This defendant is without funds. If I were to sit here, which I feel that I should if your Honor denies my application, sit here throughout the length of the trial it would cost the County fifteen dollars an hour while I am here. I'd much rather have the minutes, read them at home, and save the County an expense of my presence so that I can properly prepare for this defendant's trial, whenever it is commenced.

The Court: I don't think the People against Montgomery goes that far as to permit the minutes of a trial of another defendant, particularly where that defendant is represented by counsel of his (596a) own choice.

Mr. Ruggiero: If your Honor please, I feel that I would be entitled to get the minutes when they are made to prepare for the defense. No question I am entitled to that.

The Court: During his trial, of course.

Mr. Ruggiero: Not his trial. Not talking about daily copy now, your Honor. If your Honor says I am not entitled to daily copy under the decisions then I say this: that under the decisions I am entitled to get a copy of the transcript of Blake's trial so I can prepare Palmieri's trial.

The Court: The only way you can get that is to make your application in Part I. You can't get that from me because I say People against Montgomery does not apply in this situation.

Mr. Ruggiero: I wanted the record to show I am asking for daily copy of Blake's trial.

The Court: I say that if you want to make the application you make it in Part I on written papers.

(597a) Mr. Ruggiero: Then your Honor won't decide it

and leave it open so I can go to Part I?

The Court: I'll let you go to Part I.

Mr. Ruggiero: All right, sir.

The Court: I think that's the proper way to do it.

Court: Clerk: Defendant Palmieri is remanded.

Miss Harnes: If your Honor please, I would just like to make—

Mr. Lombardino: If your Honor please, now that the Defendant Palmieri is being remanded the People respectfully renew our request and application to have the Defendant Palmieri sent back to the Tombs in Manhattan.

The Court: Yes. The application is granted. Frank Palmieri is to be returned to the place from whence he came.

Miss Harnes: If your Honor please I'd just like to make a statement for the record, if I may. The defense objects to the trial of this case by Mr. Lombardino, as attorney for the People. He .....

APPENDIX B

Notice of Motion and Affirmation of Michael Ruggiero, dated August 7, 1969.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

—against—

FRANK PALMIERI and MICHAEL BLAKE

Defendants.

SIR:

PLEASE TAKE NOTICE that upon the annexed affirmation of MICHAEL RUGGIERO, Esq., sworn to and affirmed on the 8th day of August, 1969, and upon a copy of the indictment herein, the undersigned will move this Court at Criminal Term, Part I, thereof to be held at Queens County Courthouse at 125-01 Queens Boulevard, Kew Gardens, in the Borough of Queens, City and State of New York, on the 20th day of August, 1969, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order for the following relief:

(1) That the defendant or his attorney be furnished with a transcript of the testimony and trial of the co-defendant Michael Blake,

and for such other and further relief as may be just and proper.

Appendix B.

Dated: Jackson Heights, N.Y.
August 7th, 1969.

Yours, etc.

/s/ MICHAEL RUGGIERO,
MICHAEL RUGGIERO, ESQ.
Attorney for dft. Frank Palmieri
81-42 Baxter Avenue
Jackson Heights, N.Y. 11373

To: HON. THOMAS J. MACKELL
District Attorney—Queens County
120-05 Hoover Avenue
Kew Gardens, N.Y.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS : CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

—against—

FRANK PALMIERI and MICHAEL BLAKE

Defendants.

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

I, MICHAEL RUGGIERO attorney and counsellor at law af-

Appendix B.

firm under penalty of perjury that the following statements are true:

Upon the annexed affirmation that your affiant is the attorney for the above named defendant who was charged together with one, Michael Blake with the crime of Murder In an indictment containing two counts.

That heretofore a motion in behalf of the defendant Frank Palmieri was made for a severance and which motion was held in abeyance until the determination by this court of its decision on the Huntley Type Hearing which was held before Hon. Albert H. Bosch, a Justice of this Court on March 10th, 11th, 12th, 13th, and 14th, 1969.

That on March 17th, 1969, the court rendered its decision that the admissions allegedly made by the defendant Michael Blake were voluntary and the motion to suppress the said statements was denied.

That your affiant having been appointed pursuant to Article 18-B, of the County Law attended and participated in the said hearing and at the time of the Court's decision the application of your affiant in behalf of the defendant Frank Palmieri for a separate trial was granted and his trial was severed. At that time your affiant made an application to the Court that the defendant or his attorney be furnished with daily copy of the co-defendant's trial in order that the rights of the defendant Frank Palmieri be fully protected. The application was made from the authorization of People vs Montgomery 18, N.Y. 2d, 993, which the Court stated that the application for the minutes of the trial of Michael Blake should be made by application on affidavits in Part I, of this Court. The Court indicated at that time at page 499, of the Huntley Hearing testimony, that the court was reluctant to grant the application because it did not come within The People vs. Montgomery ruling.

Thereafter your affiant received information that the co-defendant Michael Blake proceeded to trial and was convicted of Murder.

Appendix B.

From my investigation I have ascertained that testimony was adduced as to the alleged admissions, statements and confession of Michael Blake during his trial which implicated the defendant Frank Palmieri.

The defendant Frank Palmieri proceeded to trial before the Court and jury on May 19th, 1969, and on May 26th, 1969, the defendant was found guilty of Murder. At the time of the conviction of the defendant Frank Palmieri your affiant reserved the right to make motions with respect to the jury's verdict until the time of sentence. The defendant has not to this day been sentenced.

It is necessary in order to fully protect the constitution rights of the defendant Frank Palmieri that he or his attorney be furnished with a copy of the transcript and testimony of the trial of Michael Blake.

It is your affiant's contention that because of the denial by the Court to furnish him or his counsel with the minutes of the trial of Michael Blake the co-defendant, that the defendant Frank Palmieri had been denied equal protection of law, in that because of his indigence he had been unable to secure the said minutes. This is another ground upon which your affiant intends to move to vacate and set aside the verdict of the jury upon constitutional grounds stated herein.

That no previous application for the within relief has been made except as stated herein.

WHEREFORE, your affiant respectfully asks that an order be made directing that the defendant Michael Blake and his attorney be furnished with a transcript of the said minutes of the trial of the co-defendant, Michael Blake.

Dated: Jackson Heights, New York,
August 7th, 1969

Submitted and Affirmed

By: /s/ MICHAEL RUGGIERO
Michael Ruggiero